Nos. 64 and 83

In the Supreme Court of the United States

October Term, 1960

Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, petitioner,

v.

The National Labor Relations Board

The National Labor Relations Board, petitioner,

v.

Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

On a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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PETITIONER,

v.

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THE NATIONAL LABOR RELATIONS BOARD
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v.

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF LOCAL 357

The Board's position in this case is reached by dividing Section 8 (a) (3) of the Act in two parts, the first having to do with "discrimination" in employment, and the second dealing with encouragement of union membership. The Board then proceeds on the premise that the term "discrimination" can be equated with the term "difference" or "disparity", that the term embraces *any* such difference in

employment without reference to union membership (using that term in its broadest sense), and that such discrimination has been established in this case by reason of the referral agreement under which two classes of job seekers have been created—those who must apply through the union, and those who need not. The Board then proceeds to the conclusion that it can reasonably be inferred from the mere existence of this referral agreement that an encouragement of union membership results within the meaning of the concluding portion of Section 8 (a) (3). The Board offers this formula: Any difference in treatment of employees respecting their tenure, term or condition of employment plus a resulting and reasonably inferrable encouragement or discouragement of union membership equals a violation of Section 8 (a) (3).[1]

It is respectfully submitted that the Board's premise is fallacious, its conclusion is unwarranted in fact and in law, and its resulting formula is overly pat. Section 8 (a) (3) is indivisible, and to divide it as the Board does would imperil the whole fabric of collective bargaining. Under the Board's reasoning, since all collective agreements create discriminations which reasonably could be said to encourage union membership, all could be held violative of Section 8 (a) (3).

I

THE BOARD'S PREMISE THAT A "DISCRIMINATION" EXISTS IN THIS CASE OR THAT *ANY* DISCRIMINATION SUFFICES IS ERRONEOUS; THE DISCRIMINATION MUST HAVE SOME RELATIONSHIP OR REFERENCE TO UNION MEMBERSHIP.

A. *There is no "discrimination" created in this case by the establishment of the referral system.*

[1] A violation of Section 8 (a) (3) if done by an employer, a violation of Section 8 (b) (2) if done by a union, and in addition respective automatic violations of Section 8 (a) (1) and 8 (b) (2), Section 7 rights being necessarily involved.

We will demonstrate shortly that the term "discrimination" as used in Section 8(a)(3) necessarily must have regard to union membership or the lack of it and is integrally and inseparably related to the latter portion of Section 8(a)(3) so that the Section must be read and applied only as a whole. However, even though it be assumed with the Board that a separation can be made and that any difference or disparity in employment constitutes a "discrimination", no such difference or discrimination exists in this case.

The discrimination in the present case, says the Board (Brief, p. 19), consists of "the division of employees by the instant contract into those who are cleared for employment through the hiring hall and were thereby eligible to work, and those who are not so cleared and are thereby precluded from working." But this difference does not constitute any sort of discrimination, difference or disparity in this case no matter how those terms are defined. This is so because the Board has failed accurately to define the class to which the requirement of recourse to the dispatching service or hiring hall is applicable. The class involved under the referral agreement in the present case is composed of all workmen who desire casual employment. All within that class are subject to the same requirement of proceeding through the hiring hall, and all within that class have been treated equally here in respect to their employment rights. A requirement which is applicable to the whole class cannot constitute discrimination against any member of the class. *People* v. *Arlen Service Stations, Inc.*, 284 N. Y. 340, 31 N. E. 2d 184, 186; *Slome* v. *Godley*, 304 Mass. 187, 23 N. E. 2d 133, 137. What the Board brief is in reality saying is that to enforce a uniform standard is to discriminate against the member of the class who chooses to disregard it. But it is as impossible to say that a worker who seeks casual employment is discriminated against when he is required to resort to the hiring hall as it is impossible to say that a motorist is discriminated against who is re-

quired to travel the right way on a one-way street, or that a customer is discriminated against when he is denied admission to a store before opening hours or after closing hours, or that an applicant to law school is discriminated against when he is denied admission because he does not have a college degree uniformly required of all students seeking entrance. If the creation of a class of those who have to go through the union for a job and those who don't creates a relevant difference or "discrimination", then so does the creation of a class of those who must be represented by a union in obtaining and maintaining their conditions of employment and those who do not. This, as we will now show, simply cannot be so.

B. There is "no discrimination" relating to union membership or in any invidious sense as required by the Act.

Even if one were to assume with the Board that the relevant class consists of workers seeking casual employment who do not wish to go through the union for employment, the creation of that class as such does not constitute a "discrimination" as the term used in Section 8(a)(3). That term used in the context of the National Labor Relations Act cannot be made to stand alone or be given its bare, literal or dictionary meaning as was the case in *Federal Trade Commission* v. *Anheuser Busch, Inc.*, 363 U. S. 536, relied upon by the Board in this case. (Board Brief, p. 24.) The National Labor Relations Act, unlike the Clayton Act under consideration by this Court in *Anheuser Busch*, deals with persons, not products, with individual rights and the relationships between unions and employers. Its ultimate purpose is to foster free collective bargaining in the making of agreements, and as an important means to that end, as we have seen in our principal brief, p. 25, it prohibits not simply any type of discrimination but only that discrimination which has relevance to union membership or the lack of it and which operates to encourage or discourage such membership. All life and law is rooted in

different treatment based upon rational classification. *Tanner* v. *Little*, 240 U. S. 369, 381-383. But offensive differentiation which the law prohibits "goes no further than the invidious discrimination." *Williamson* v. *Lee Optical*, 348 U. S. 483, 489; *Morey* v. *Doud*, 354 U. S. 457, 463. And it hardly establishes "invidious discrimination" to show that the union has contracted to require employees within the unit it represents to follow a particular course of conduct and to insist upon adherence to that course. "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. *The mere existence of such differences does not make them invalid.*" (emphasis supplied.) *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 338. A representative is not "barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit." *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U. S. 192, 203.

On the Board's premise that any disparity or difference in employment created by a union or an employer, or both together, furnishes a predicate for a Section 8(a)(3) violation, the entire collective bargaining process is imperiled. All collective bargaining agreements contain many differences or discriminations which reasonably could be said to encourage union membership. Indeed, the mere fact that the union is given the status of an *exclusive* bargaining representative creates the exact type of discrimination with resulting tendency to encouragement which the Board relies upon to conclude that the union-operated referral sys-

tem or hiring hall unlawfully encourages union membership. With the union acting as the administrator of the collective agreement, it is to the interest of employees to "ingratiate" themselves with the union (to use that term to accord with the sense of the Board's basic argument in this case) by taking active part in the union's activities just as much if not more than it is to their interest to do so when the union is the source of employment in the first instance. The union's power of contract interpretation as applied in particular instances to particular persons, and particularly the union's function as the negotiator of grievances under collective agreements, makes it as important for the employee to stand in well with the union as in the case where the hiring is done through the union. There, as here, the Board could well say that a disparity or difference has been created by the establishment under the collective agreement of a class of persons who must look to the union for contract interpretation or assistance in the settlement of grievances and a class of those who do not have to so look, and equally well might the Board conclude that it can reasonably infer from the fact of this difference that there is an encouragement of union membership.

Indeed, there are particular disparities or discriminations created by collective bargaining agreements which directly encourage union membership, but which this Court has held to constitute no violation of the National Labor Relations Act. We refer to the case of *Aeronautical Industrial Lodge* v. *Campbell*, 337 U. S. 521. In that case the collective agreement provided that union stewards, by virtue of their union office alone, were to be accorded a superseniority beyond that accorded veterans, and this Court refused to hold that an invalid discrimination was thereby effected. While this Court's decision in that case involved merely the question of whether the clause constituted a discrimination in violation of the Veterans Preference Act, this Court, when it later considered another

type of seniority clause in *Ford Motor Company* v. *Huffman, supra,* 345 U. S. at 339, directly decided the precise question of whether collectively bargained seniority provisions creating alleged discriminations violated the National Labor Relations Act, and in holding that they did not, made particular reference to the situation in *Aeronautical Industrial Lodge*. Thus, in *Huffman*, this Court stated as follows:

> "The National Labor Relations Act, as amended, gives a bargaining representative not only wide responsibility but authority to meet that responsibility. We have held that a collective-bargaining representative is within its authority when, in the general interest of those it represents, it agrees to allow union chairmen certain advantages in the retention of their employment, even to the prejudice of veterans otherwise entitled to greater seniority. Aeronautical Industrial Dist, Lodge v. Campbell, supra (337 US at 526-529)".[2]

It is submitted that the Board's argument and reasoning in the present case cannot be reconciled with this Court's decisions in *Ford Motor Company* v. *Huffman* and *Aeronautical Industrial Lodge* v. *Campbell, supra*. In *Aeronautical Lodge*, a difference or disparity could be said to exist even more than it could be said to exist in this case, and that difference had even more relationship to union membership as such than is true here. In this case, Slater was denied employment not because he was or wasn't a union member or active in union affairs but because he chose to obtain employment outside the framework which had been set up by the union and the employer in the process of bargaining. In *Aeronautical Lodge*, the individuals received preferential treatment not because of their

[2] See also a recent decision of the Board in *Hooker Chemical Corp.*, 128 NLRB No. 133, decided August 30, 1960, in which the Board upheld an arrangement in a collective agreement under which employees desiring to obtain leaves of absence which would not affect their seniority were obliged to obtain the approval of the union as well as of the employer.

actual union membership or lack of it, but because of the functions, albeit union functions, they were performing. In neither case was there any discrimination in the invidious sense of a deliberate attempt to create a preference based on the mere fact of union membership. It is for that reason that there cannot be said to be a violation of Section 8(a)(3), unless there is an element of invidiousness having a relationship to union membership as such.

The legislative history of Section 8(a)(3)[3] indicates that the evil Congress was intending to cope with was a preference or discrimination predicated upon the bare fact of union membership or the lack of such membership, and the course of Board decision until the present one has consistently followed an interpretation of the term "discrimination" in Section 8(a)(3) as having a necessary relationship to union membership. In *Radio Officers Union v. N.L.R.B.*, 347 U.S. 17, heavily relied upon by the Board, union membership as such was directly involved because access to the hiring hall in that case was restricted to members in good standing, and the job applicant was refused access to the hall because he had lost his membership through infraction of the union rules. Thus the discrimination in that case was directly referable to union membership.

To require a regard for union membership or the lack of it in defining the term "discrimination" as used in Section 8(a)(3) does not, as the Board argues, render the concluding portion of Section 8(a)(3) superfluous for the reason that the Section must be read as an entity. The concluding language of the Section merely gives body, content and direction to the provision as a whole. The provision cannot be separated or broken down as the Board has done here; it must be read singly if obviously unintended results are not to follow. This Court so read it in *Radio Officers, supra,* when it said:

[3] 93 Cong. Rec. 4318, II Leg. Hist. 1097.

> "Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization as proscribed." (347 U.S. 17, 43)

What has been said above does not detract from the declaration of this Court in *Radio Officers* (347 U. S. at 40 and Board Brief, p. 34) that it is the "policy of the Act * * * to insulate employees' jobs from their organizational rights". All that we are saying is that a union referral provision in a collective bargaining agreement, equally with a provision which gives to the union the exclusive right to handle grievances, let alone a provision giving seniority preference to union stewards, does not operate to interfere with the right of employees "to freely exercise their rights to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." *Radio Officers, supra*, 347 U. S. at 40. There is nothing in this case to indicate Slater was refused employment because he was not a union member in good standing or even because he was not an active member. There is nothing in this case to indicate that Slater or any other casual employee was not free to join or not join, or be a good, bad, or indifferent member of Local 357, any more than the same could be said of any bargaining relationship in which the union is the exclusive bargaining representative, or where the union must be looked to for the purpose of processing grievances or perform any other of the numerous functions or services of an exclusive bargaining representative. Accordingly, absent the showing of some connection between the alleged disparity or difference asserted by the Board in this case, and an employee's union membership or the lack of it, it cannot be said that there was a "discrimination" within the meaning of that phrase as used in Section 8(a)(3).

In summary then, since differentiation of itself does not establish invidiousness, something additional must be shown to demonstrate that offensive inequality inheres in

the contractual requirement that casual employment be sought only through the dispatching service. But in its analysis of statutory discrimination in employment effected through the existence of the hiring hall, the Board brief does not undertake to show that this contractual requirement is not relevant to the plain economic purpose of regularizing casual employment, of providing employers with an efficient means of hiring casual labor, and of assuring the employees of a fair, evenhanded, and dignified means of securing casual employment. Rather, the Board brief explicitly disclaims the only inquiry that the Board is authorized to make, namely, whether the contractual standard is referable to or based upon union membership or its lack. The Board brief rests upon the single element that under the contract casual employment will be denied to employees who attempt to secure it without recourse to the dispatching service. But in the absence of an additional vitiating factor—which the Board brief not only does not show but disclaims the need to show—all that this demonstates is that the employee must do what the contract required. But, as we have seen in our principal brief, page 35, it cannot constitute "invidious discrimination" to insist that an employee who wishes casual employment seek it through the means that the contract provides. We repeat, "A labor agreement is a code for the government of an industrial enterprise" (*Aeronautical Industrial Lodge* v. *Campbell*, 337 U. S. 521, 528), and freedom from discrimination does not free the employee from obedience to the code any more than it frees the citizen from obedience to the law. The statutory prohibition against discrimination in employment does not license industrial anarchy.

The Board's position must rest on the assumption that discrimination referable to union membership or the lack of it is necessarily established from the fact that it is the union which operates the dispatching service to which recourse is required to secure casual employment. The Board

brief does not trouble to explain how, standing alone, discrimination is shown by a union's operation of a hiring hall any more than discrimination would be shown by an employer's operation of its personal office. The Board's position can make sense only by indulging the presumption that the union will operate the hiring hall discriminatorily by preferring members and disadvantaging non-members. We agree that the Board does act on this presumption but we disagree both with its rationale and that it has the power to do so.

II

THE BOARD'S CONCLUSION THAT IT CAN REASONABLY INFER THAT THE REFERRAL CLAUSE IN AND OF ITSELF OPERATES TO ENCOURAGE UNION MEMBERSHIP IS UNWARRANTED BOTH IN FACT AND IN LAW.

Under the guise of supporting the Board's conclusion that a union's operation of a hiring hall *unlawfully* encourages union membership "is reasonable", the Board brief attempts to document the tenability of the Board's presumption that a union operates a hiring hall discriminatorily. This attempt is logical. For the only encouragement which the statute interdicts is that which flows from detriment to the employee referable to his lack of union membership or default in the performance of the obligations of union membership. The Board is therefore driven to attempt to show that the mere existence of the union-operated hiring hall operates to encourage union membership. It does not attempt to show that the operation of the hiring hall has in fact had that effect.

A. The Board's Version of the "Character" of a Hiring Hall

The Board brief recites its version of the character of a hiring hall (Bd. br. pp. 30-34). The dominant theme in the Board brief that a union is given complete and un-

fettered control over hiring conflicts with the record in this case. There are in this case at least five significant respects in which the employer controls hiring. (1) An employer's request to dispatch a named employee for casual work is complied with if that employee is present at the hall when the request is received (R. 31, 17, Tr. 308). (2) The employers have and exercise the authority to reject a referred employee deemed unsatisfactory (R. 34-35). (3) The agreement specifically provides that "Discharge of any employee by any employer shall be grounds for removal of any employee from seniority status". (4) The employer is free to hire casual employees "from any other available source" if the dispatching service notifies the employer that "such help is not available" through it, or if the employees dispatched "do not appear for work at the time designated by the employer" (R. 63). (5) The hiring hall is "three miles or over" from the union hall (R. 13), so that it cannot be said that any undue pressure exists by the reason of the fact that the union headquarters itself is the hiring hall.

Furthermore, even where union hiring halls exist, employers customarily exercise the right to determine whether to hire the employees sent to them by the union. Thus, at p. 158 of the Senate Hearings on S. 1973,[4] it is said that, "It has been traditional in the construction industry, whether or not the workmen were union members, for the employer to have the right to select the workmen best suited for the work to be done. . . ." And the book cited for another purpose at p. 31, n. 14, of the Board brief states at p. 43 that, "The employer is normally free . . . to refuse to hire a man sent out by the local without prejudice toward requesting a replacement."

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[4] Hearings, S. 1973, Senate Subcommittee, Labor & Labor-Management 82nd Cong., 2d Sess., p. 158.

B. The Board Brief's Reliance upon The Board's Alleged Experience with Hiring Halls

1. The Board brief draws upon the Board's alleged experience with hiring halls (Board brief, p. 33 and Appendix to Board brief.) The Appendix lists 44 examples of such experience. If these sample decisions are numbered in the order in which they appear in the Appendix and then analyzed, the following will appear:

Subject of Cases	Number of Cases
A. Cases in which the conduct at issue involved no hiring hall or union participation in the initial hiring process	10[5]
B. Hiring hall cases	
1. The agreement establishing the hiring hall is non-discriminatory on its face but discriminatory in application	8[6]
2. The hiring hall is not established by agreement but operates in practice to give preference to union members	3[7]
3. The agreement establishing the hiring hall provides on its face for discriminatory dispatch	7[8]
4. Illegal hiring hall arrangement in which the unfair labor practice at issue was unrelated to the hiring hall	1[9]

[5] Cases 7, 14, 15, 21, 25, 26, 27, 32-33, 44.
[6] Cases 3, 4, 42, 20, 28, 34, 36, 38.
[7] Cases 9, 43, 35.
[8] Cases 1, 2, 8, 12, 10, 13, 19.
[9] Case 5.

Subject of Cases	Number of Cases
C. Closed Shop cases	
1. Written closed shop agreements providing for hiring through the union, partly or wholly, but in which apparently no formal hiring hall was operated.....	9[10]
2. Oral closed shop agreements providing for hiring through the union, partly or wholly, but in which apparently no formal hiring hall was operated.....	3[11]
3. Closed or otherwise illegal union shop providing for hiring through the union, partly or wholly, with apparently no operation of a formal hiring hall, but in which the unfair labor practice at issue did not involve the hiring process..	2[12]

It is plain from the foregoing that, of the 44 cases in the so-called "sample," 10, or more than 22 percent have nothing whatever to do with the operation of a hiring hall. Represented in these 10 cases is any kind of case in which an act of discrimination of whatever variety occurred.

Furthermore, of the 44 cases in only 19 does it appear that the hiring process involved the actual operation of a hiring hall. This constitutes 43 percent of the "sample," and averages 2.7 cases each year for a seven-year period. And of the 19, there are but 8 cases in which the agreement establishing the hiring hall is non-discriminatory on its face but discriminatory in operation. This constitutes 18.1 percent of the "sample," and somewhat better than one case per year in a seven-year period. This hardly constitutes a basis in "experience" for saying that an otherwise non-

[10] Cases 11, 16, 17, 18, 29, 37, 39, 40, 41.
[11] Cases 23, 30, 31.
[12] Cases 6, 22.

discriminatory agreement is necessarily invalid and that there must still be added the Board's three requirements to guard against discriminatory application.

As stated in our principal brief (p. 39), the Board cannot use its asserted expertise to support pivotal assumptions or substitute experience for evidence.[13] There is not a jot of actual evidence that Slater or any other casual employee was in fact discriminated against because of his union membership or lack of it, and the Board relies entirely on conjecture and presumption supported by an alleged "expertise" which it has not demonstrated.

2. Not only does the Board brief misstate what the "sample" shows, but the "sample" is otherwise thoroughly unscientific in conception. Excluded from the "sample" are cases in which the Board dismissed complaints alleging unlawful union participation in the hiring process. *E.g.*, *Motor Truck Association of Southern Cal.*, 110 NLRB 2151; *Maxon Construction Co.*, 112 NLRB 444; *International Asso. of Theatrical Stage Employees*, 119 NLRB 81[illegible]. Similarly excluded are cases in which the Courts of Appeals reversed findings by the Board of unlawful union participation in the hiring process. *E.g.*, *Local 553, Teamsters Union* v. *N.L.R.B.*, 266 F. 2d 552 (C.A. 2); *N.L.R.B.* v. *Painters*

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[13] We refer the Court to a recent definition of the term "expertise" formulated by Trial Examiner William E. Spencer in his Intermediate Report in the case of *Local Union No. 741, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry and Independent Contractors Association*, Case No. 21-CP-7 (I.R., p. 7, footnote 5): "*expertise*, that 'quality of know-all in a given field which magically invests the administrative judge from the moment he takes the oath, regardless of prior experience; a quality that is unpredictable, fickle and diverse, for what is firmly established by expertise today may be dismissed tomorrow as having no firmer foundation than conjecture or mere suspicion; itself of the nature of an irrebuttable presumption it begets irrebuttable presumptions; a term which lost much of its lustre in the declining days of the New Deal and has since yielded ground to more commonplace expressions such as 'specialized knowledge' or just plain 'experience', substitutions which appear to satisfy those remonstrants of excess bureaucratization under an earlier régime."

Union, 242 F. 2d 477, 478-480 (C.A. 10); *Del E. Webb Construction Co.* v. *N.L.R.B.*, 196 F. 2d 841 (C.A. 8). Nor is any account taken of the countless instances of everyday operation of hiring halls without any blemish. The Board brief would thus determine the incidence of a disease by excluding from the survey those who recovered from it and those who never contracted it.

3. The baseless inference that the Board brief would draw from its "sample" is that unions are inveterate law breakers for whom an "*ad hoc*" search into the circumstances of each case of alleged discrimination is bootless and to whom a comprehensive and institutional approach must be applied. If this approach is sound as to unions, it is *a fortiori* sound as to employers, for the Board's statistics show that acts of discrimination are far more widespread among employers than unions. Thus, a comparative study of workers receiving back pay, and who were thus the victims of discrimination, shows that:

	Back Pay From Employers		Back Pay From Unions	
Fiscal Year	Number of Employees	Sum	Number of Employees	Sum
1958[14]	1,368	$ 673,260	291	$88,673
1957[15]	1,457	515,910	222	85,149
1956[16]	1,955	1,322,904	205	65,410
1955[17]	1,836	785,710	188	95,510
1954[18]	2,292	891,556	122	37,890
1953[19]	2,987	1,307,230	199	49,950
1952[20]	2,734	1,345,882	87	23,910

[14] NLRB, 23 Ann. Rep. 146.
[15] NLRB, 22 Ann. Rep. 164.
[16] NLRB, 21 Ann. Rep. 166.
[17] NLRB, 20 Ann. Rep. 162.
[18] NLRB, 19 Ann. Rep. 158.
[19] NLRB, 18 Ann. Rep. 96.
[20] NLRB, 17 Ann. Rep. 282.

Since it is apparent that employers are guiltier than unions, the Board would be justified on its theory in devising "institutional" requirements for employers in exercising their personnel functions. Thus, if the plant is unrepresented, the employer should post on its bulletin boards a statement that obtaining and retaining employment is not based on, or in any way affected by, union membership or activity, and the statement should further explicate the objective standards used by the employer in exercising its power to hire, promote, and discharge employees; if the plant is represented by a union, the same procedure must be followed, and in addition the standards must be incorporated into the collective bargaining agreement. An employer who fails to do the foregoing is presumed to exercise its personnel functions discriminatorily.

This is the logic of the Board's reasoning. We think it would be absurd were it applied to employers. We submit it is no less absurd when applied to unions.

4. The premise of the appendix sample embraces a fundamentally false tenet. What we said in our opening brief (p. 38), quoting from the Supreme Court's decision in *Rountree* v. *Smith*, 108 U.S. 269, 276, bears repetition: We "do not think the evidence of what other people intended by other contracts of a similar character, however numerous, is sufficient of itself to prove that the parties to these contracts intended to violate the law or to justify . . . making such a presumption." "In this country," as Judge Swan has stated, "imputed crime is substantially unknown." *Warhauser* v. *Lloyd Sabaudo S.A.*, 71 F. 2d 146, 148 (C.A. 2). "Guilt with us remains individual and personal. * * * It is not a matter of mass application." *Kotteakos* v. *United States*, 328 U.S. 750, 772. It is still true that "guilt by association remains a thoroughly discredited doctrine. . . ." *Uphaus* v. *Wyman*, 360 U.S. 72, 79.

C. The Board Brief's Version of the "History" of the Hiring Hall

The Board brief states that before the 1947 amendments the hiring hall was linked with the closed shop (Bd. br. p. 31). This was then entirely lawful. The Board brief further states that the 1947 amendments invalidated the closed shop. This is true.[21] The Board brief would then draw from this "history" the inference that, although the closed shop was invalidated in 1947, unions nevertheless thereafter continued to operate hiring halls upon a closed shop basis. It is a novel application of the presumption of continuity to say that a course of conduct, legal when initiated, continues to be pursued after it has been illegalized.

The Board brief's version of "history" is such that it feels free totally to ignore the incontrovertible fact that the hiring hall as an economic institution came into being and exists because it is addressed to and solves the genuine need of regularizing casual employment. The Board brief not only ignores this fact, but it compounds its lack of compunction by suggesting that, unlike other economic benefits negotiated by unions, a union negotiates a hiring hall to help itself. This inference will not be appreciated by the longshoreman who no longer has to shape up, the seaman who no longer has to be hired off the dock, or the

[21] A closed shop requires existing union membership as a condition of initial employment. The 1947 amendments amended Section 8(3), now Section 8(a)(3), to permit union membership as a condition of employment beginning 30 days after hire, or 30 days after the effective date of the agreement, whichever is later, and to provide that the agreement could be invoked to cause the discharge of an employee only for non-payment of periodic dues and initiation fees. The 1959 Amendments permit a 7-day instead of a 30-day grace period. It is significant that the 1959 Amendments, Section 705, added a new Subsection (f) to Section 8 of the National Labor Relations Act to permit the union hiring hall in the construction industry, but nowhere is it provided in the law that the three requirements which the Board insists on as a condition of a valid agreement be incorporated. This would seem to indicate Congressional belief that the hiring hall in and of itself does not constitute an undue invasion of Section 7 rights or tend to encourage union membership.

building and construction craftsman or other casual laborer who no longer has to make the rounds searching haphazardly for work. The Staff Report of Committee on Labor and Public Welfare, U. S. Senate, 82nd Congress, 2nd Session, states at p. 12 that "the subcommittee and the committee of which it is a part have several times pointed to the evils which frequently result from alternative methods [to the hiring hall] such as the shape-up. It is not unlikely, as revealed by the Kefauver Crime Committee and later by the New York State Crime Commission, that the absence of the hiring hall in the maritime industry is an open invitation to kick-backs, and the penetration of the water front by the most corrupt elements in the community." We do not think that a union need apologize when it negotiates an agreement establishing a hiring hall to eliminate such evils.

The Board brief argues that by virtue of its operation of a hiring hall, the union has power to command respect and allegiance from applicants irrespective of the union's success as collective bargaining representative. Precisely the same statement can be made of the union's status as the representative which empowers it to negotiate all the terms of an agreement, to adjust grievances, and to invoke arbitration to settle unresolved contract disputes. "It has been said that there is no greater form of encouragement to membership in a union than granting it exclusive recognition.[22] Is then collective bargaining to be outlawed as encouragement of union membership? For the reasons set forth in Point I of this Reply, we think not.

D. The Board Brief's Disclaimer that The Board Indulges a Presumption of Discriminatory Operation of a Hiring Hall

The Board brief disclaims reliance upon a presumption that the Union will in fact discriminate in favor of mem-

[22] *Curtis Brothers, Inc.*, 119 NLRB 232, 238, *enforcement denied*, 274 F. 2d 551 (C.A.D.C.), *affirmed*, 362 U.S. 274.

bers when referring men, but states—not entirely consistently—that its purpose is to show that applicants can reasonably feel that their employment depends on their good standing with the union given complete and unfettered control of hiring by the employer. This rationalization will not withstand analysis.

1. The disclaimer cannot be accepted. It is inconsistent with the brief's attempt to document just such a presumption through its version of the "character and history" of hiring halls and its invocation of the Board's "experience" with them. And it is at odds with the Board's explicit statements in *Mountain Pacific Chapter of the Associated General Contractors,* 119 NLRB 883. The Board stated that (*id.* at 896):

> . . . it is reasonable to infer that the Union will be guided in its concession by an eye towards winning compliance with a membership obligation or union fealty . . .

It also stated that (*id.* at 895):

> . . . for all the Employers know or care, the Union's purpose in selecting some and rejecting others may be encouragement towards union membership, or towards adherence to union policies, matters which, were they the basis for direct employer selection, would constitute clear discriminations within the meaning of Section 8(a)(3) of the Act.[23]

2. The Board brief states that it does not rely upon a presumption that a union will discriminate but relies instead upon the view that employees "reasonably feel" the union will discriminate. This is reliance upon the presumption once removed. For the Board cannot subscribe

[23] Contrast the statement of the Court of Appeals for the Second Circuit: "The fact that . . . [a union agent] might have discriminated against . . . [an employee] is no evidence that he or the Union committed any discriminatory act." *Local 553, Teamsters Union v. N.L.R.B.,* 266 F. 2d 552, 554-555.

to the reasonableness of the employee's belief without also endorsing the validity of the employee's appraisal upon which any such belief must rest. And to reasonably justify the belief the appraisal must be that the union will act discriminatorily.

3. To condemn the union on the basis of an employee's belief, in the absence of an overt discriminatory act on the union's part, is, as stated in our principal brief, p. 36, to embrace with a vengeance the crime of imagining the king's death. For the union stands condemned not for what it did, or even for what it thought, but for what another thought. But, as Mr. Justice Jackson has said, "I know of no situation in which a citizen may incur civil or criminal liability or disability because a court infers an evil mental state where no act at all has occurred." *American Communications Asso.* v. *Douds*, 339 U.S. 382, 437. And, *a fortiori*, "We can indulge in no involved speculation as to petitioner's guilt by reason of the imaginations of others." Mr. Justice Brennan in *In re Sawyer*, 360 U.S. 622, 635.

III

THE BOARD BRIEF FAILS TO ESTABLISH EITHER THE BOARD'S POWER TO FORMULATE ANY REQUIREMENTS OR THE VALIDITY OF THE SPECIFIC REQUIREMENTS IT DID DEVISE.

1. Although the Board held that a hiring hall cannot be validly established without incorporating into the agreement the three requirements it devised, the Board brief resists any inquiry into the power of the Board to formulate any requirements or the validity of those it prescribed (Bd. br. p. 51 *et seq.*). Since the alternative to complying with the requirements is to relinquish the operation of a hiring hall, it seems obvious that the Board cannot impose "a choice between the rock and the whirlpool" without establishing its power to act at all and the validity of

what it does do. *Frost* v. *Railroad Commission*, 271 U.S. 583, 593.

2. A necessary premise upon which the Board founds its power to formulate contractual requirements for the operation of a hiring hall is that it is within its power to ban its functioning altogether. We submit that Congress did not commit to the Board the power to destroy the hiring hall and that its continued existence is not dependent upon administrative largesse.[24]

3. The Board suggests that the alternative to operating a hiring hall without incorporating the three requirements into the agreement is to operate a non-exclusive rather than an exclusive hall (that is, one in which employment may be sought either through the hall or upon direct application to the employer). This is a distinction the practical significance of which has escaped the General Counsel and Board members. In a question and answer guide to the application of *Mountain Pacific* the then General Counsel of the Board stated that (5 CCH Lab. Law Rep. ¶50,087, p. 50,262):

> The applicability of *Mountain Pacific* would appear to depend on the particular and peculiar facts of each specific case, and to turn, in the ultimate analysis, on whether the facts establish the existence of an exclusive referral system within the meaning of *Mountain Pacific*. It would appear that the applicability of *Mountain Pacific* is not restricted to situations where the employer hires 100 percent on the basis of union referral, but will be determined in light of the total hiring picture. If the totality of the hiring picture establishes in a given case that the basic objectives of *Mountain Pacific* are being thwarted, then *Mountain Pacific* would

[24] According to Board Member Joseph A. Jenkins, "There were those on the Board who were going to completely outlaw all hiring halls." Address to Building Industry Employers of New York State, at Lake Placid, New York, June 27, 1959, p. 7.

appear to be applicable notwithstanding the fact that the employer does some hiring at the job site.

Board Member John H. Fanning stated that:[25]

> Sometimes in discussions, I have heard the question raised as to whether *Mountain Pacific* and *Brown-Olds* apply in the case of a non-exclusive hiring hall. This question may be more technical than real, because generally hiring halls are not operated on a non-exclusive basis.

And Board Member Joseph A. Jenkins stated that:[26]

> Now, of course, there are many interesting technical questions which can be raised in the application of the Board's *Mountain Pacific* formula. For example, the first question that occurs is: When is a hiring hall exclusive, and when is it nonexclusive? Is it a nonexclusive hiring hall if you hire at least one employee a year from sources other than the hall? This type of question leaves me a little impatient and leads me to believe that the person asking the question does not understand that the National Labor Relations Board is interpreting a statute embodying a social policy and not a criminal statute. If a substantial part of all the employers' employees come from the hiring hall, I would say that the union was the agent of the employer under *Mountain Pacific* for purposes of that hiring hall. Any other interpretation goes into technicalities which lose sight of what the Board is trying to do.

Furthermore, even where the distinction between an exclusive and a non-exclusive hiring hall to command more respect than it does, to operate a hall on a non-exclusive basis is to surrender one of its major virtues. An exclusive hall funnels all job opportunities to a central locus from which they can be distributed on an evenhanded basis. Men who use the hall need not fear that they are losing work to

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[25] Address, Union Shops and Hiring Halls, Third Yale Law School Alumni Day, April 25, 1959, p. 7.

[26] Address to Contracting Plasterers and Lathers International Association, Washington, D. C., June 3, 1959, 44 LRR 135, 141.

others who are making the rounds. Todayism to employers is reduced and the temptation upon the employer to offer and upon the employee to snag a job at less than the prevailing union standard is minimized. Thus, the alternative of a non-exclusive hiring hall, which the Board brief suggests as an equivalent to the exclusive hall, involves the relinquishment of important advantages.

The statutory concept of free and private collective bargaining is at war with the view that, upon a subject about which the employer and the union are at liberty to disagree, the Board can effectively compel both to accede to what neither may want and either may resist.

4. The Board brief fails altogether to meet the specific objections to the validity of the three requirements which we have detailed in our brief (pp. 32-37). The Board brief suggests that a union which is performing its statutory obligation to treat members and nonmembers equally can have no legitimate objection to telling job applicants that it does so. We think it suffices to say that one does not have to be a thief to resist and resent filing an affidavit that he is not.

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